No. 14,517

IN THE

United States Court of Appeals

For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

REPLY BRIEF FOR APPELLANT.

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ARGUMENT.

Appellee, in his brief, argues that he was deprived of four specific rights when he was inducted into the army. Three of these claims relate to matters not discussed by Judge Harris in his opinion granting the writ of habeas corpus. These are:

1. That the local board failed to grant LaRose a personal appearance.

2. That appellee did not receive a hearing before the Department of Justice.

3. That appellee was indicted during the time an appeal of his classification was pending.

Appellee also argues that he was denied the right to appeal his classification as the court held below. These arguments appellee lists as his questions presented (Appellee's Brief, pages 6, 7).

In his brief appellee completely ignores the question of exhaustion of administrative remedies raised by appellant in his opening brief. We argued that Judge Harris committed error in granting a writ of habeas corpus because LaRose did not exhaust his administrative remedies by appealing from the Selective Service classification under which he was actually inducted. We cited the case of *Skinner v. United States* (9th Cir.), 215 F. 2d 767, in support of our argument. Skinner was inducted on a classification which was made on April 24, 1953. The court held that if any errors were committed by the local board in the two classifications Skinner had received prior to the April 24 classification, "such errors were corrected by the new classification of April 24, 1953." The court further held that since this classification was not appealed from, any errors were waived.

In the present case appellee was actually inducted under a classification received on September 23, 1952 (File 9). The "errors", if any, urged by appellee (Appellee's Brief, page 9) occurred in January or February 1952 (Tr. 19). After appellee wrote two letters to the board, the board on March 20, 1952 classified him II-S, but appellee was not inducted under this II-S classification. He was inducted under the classification of September 23, 1952. This classification was not appealed from. Appellee, like Skin-

ner, has waived any error which might have occurred in the March 20, 1952 classification. Furthermore, the classification of September 23 corrected any errors which might have occurred in the classification of March 20 just as any errors committed by the local board in the case of Skinner "were corrected by the new classification of April 24, 1953".

Appellee in his brief has simply ignored the well settled principle in Selective Service cases that a registrant must complete the administrative procedure provided under the Act before he may secure judicial review. See *Mason v. United States* (9th Cir.), No. 14,286, and *Williams v. United States* (9th Cir.), 203 F. 2d 85, 88. The three errors which he claimed occurred in his classification all related to the local board's treatment of the two letters which the board received on February 5 and 7, 1952. If the local board had granted him an appeal on the basis of those letters, he would have received a hearing before the Department of Justice. If the local board had interpreted the letters as a request for a personal appearance, he would have received that. However, the local board, as apparently required by *United States v. Vincelli,* 215 F. 2d 210, interpreted the letters as a request for reconsideration and granted appellee a II-S classification. Appellee did not appeal from this classification, or that of September 23.

Appellee's final argument is that appellee was inducted during the pendency of an appeal contrary to Selective Service regulations. However, the undisputed testimony at the trial was that appellee did not

appeal his September 23 classification. When asked on cross-examination whether or not he appealed that classification, he answered "No I didn't (Tr. 61)". No record of an appeal appears in the file.

There was some testimony referred to by appellee at page 13 of his brief to the effect that LaRose contacted members of the Selective Service System in Milwaukee, Wisconsin, and discussed his classification. He did not identify who these persons were. However, there is no finding of fact by Judge Harris on this point pursuant to Rule 52 of the Federal Rules of Civil Procedure. He claims that he spoke with a Deputy State Selective Service Director who declared that an appeal would be useless because "they had just voted on it and reached a conclusion I was a I-A-O and nothing more and there was nothing I could do about it but be drafted". The regulations provide for the local board, not the State Director to classify registrants. An appeal may be taken only "by filing with the local board a written notice of appeal". *Selective Service Regulation 1626.11.* But here there is no testimony in the record that appellee took an appeal either orally or as required in writing. The testimony of appellee only indicates that he had some conversation with Selective Service officials concerning his classification. Nowhere in the record does he claim to have requested an appeal.

Since no appeal was ever taken, the provisions of the regulations discussed by appellee at page 13 of his brief do not apply. Appellee claims that since appellant produced no testimony to contradict his

testimony at pages 60, 61, 62 and 63 of the record at the trial in San Francisco from unidentified witnesses in Milwaukee, Wisconsin, this Court must find that he "took an appeal". However, those transcript references do not show any claim by appellee at the trial that he demanded an appeal before induction. Since they do not say anything about an appeal, it is hard to conceive how there was any burden on the government to show that there was no appeal requested.

Appellee also ignores the case of *United States v. Vincelli,* supra, cited by appellant. This case holds that letters similar to those received by the local board at File 61 must be treated as a request to reopen a classification, exactly what the local board in this case did. He also ignores the plain language of the letters themselves where appellee expressly says, "I would also like to know how I, as a student, stand with your board, disregarding my conscientious objections (Tr. 20, File 63)", and the letter at File 66 which ends "Please, carefully reconsider your classification. I can ask of you nothing more (File 67)."

No reason has been given to this Court why the local board should have ignored the plain mandate of the *Vincelli* case that these letters should be considered as a request for reconsideration. Appellee merely assumes that an appeal, a personal appearance and a hearing before the Department of Justice should have been granted. He then cites cases which hold that a registrant is entitled to those rights on proper request. But he has ignored the crucial ques-

tion. He has assumed the very fact which is in issue—that is, whether he made a proper request in February, 1952 for either an appeal or a personal appearance. This does not constitute a reply to appellant's argument. For this reason and since appellee has apparently conceded that he has not exhausted his administrative remedies, we respectfully request that the writ of habeas corpus heretofore issued be discharged and appellee returned to the custody of appellant.

Dated, San Francisco, California,
March 7, 1955.

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